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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 583

JOSEPH PATERNO, PETITIONER,

vs.

JOHN A. LYONS, AS COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED DECEMBER 12, 1947.

CERTIORARI GRANTED FEBRUARY 9, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FOURTH DEPARTMENT

SUPREME COURT—ERIE COUNTY

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Corrections of the State of New York, Petitioner,

For an Order Directed to Honorable HAMILTON WARD, JR., as Judge of the County Court of Erie County, and Joseph Paterno, Respondents

NOTICE OF APPEAL

SIRS:

Please Take Notice that the respondent Joseph Paterno hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Special Term of the Supreme Court, Erie County, granted in the above entitled proceeding on the 29th day of July, 1946 and entered on the same day in the Erie County Clerk's Office, prohibiting the Honorable Hamilton Ward, Jr., as Judge of the County Court of the County of Erie from vacating the judgment of the Erie County Court entered the 16th day [fol. 2] of July, 1937, in an action entitled "People of the State of New York v. Joseph Paterno" and enjoining and restraining said respondent, the Honorable Hamilton Ward, Jr., from taking any of the affirmative steps proposed to be taken by him in accordance with his opinion dated March 20, 1946; and said respondent Joseph Paterno hereby appeals from the whole and each and every part of said order.

Dated: Buffalo, New York, July 31st, 1946.

Saft, Schweitzer & Sullivan, Attorneys for Respondent, Joseph Paterno, Office and P. O. Address, Suite 502-03, 17 Court St. Bldg., Buffalo, New York.

To: Nathaniel L. Goldstein, Attorney General, (Emil L. Cohen, Assistant Attorney General, of Counsel) for Petitioner.

Leo J. Hagerty, District Attorney of the County of Erie, Amicus Curiae (Maurice Frey, Assistant District Attorney, of counsel).

To: Samuel M. Fleischman, for Respondent, Hon. Hamilton Ward, Jr., as Erie County Judge.
Harry C. Vackel, Clerk of the County of Erie.

[fol. 3] At a Special Term of the Supreme Court held in and for the County of Erie in the County Hall in the City of Buffalo, N. Y. on the 1st day of July 1946.

Present: Honorable Paul J. Batt, Justice Presiding.

(Same Title)

ORDER APPEALED FROM

Upon reading and filing the notice of motion herein dated March 29, 1946, the petition of the Hon. John A. Lyons, verified the 29th day of March 1946, the opinion of the Hon. Hamilton Ward, Jr., dated March 20, 1946 and order of the Hon. Frank A. James dated April 9, 1946, notice of motion on behalf of the respondent Hamilton Ward Jr., dated April 4, 1946, the answer of the respondent Joseph Paterno verified the 5th day of April 1946, and after hearing Nathaniel L. Goldstein, Attorney-General of the State of New York, by Emil L. Cohen, Assistant Attorney-General, on behalf of the petitioner and Leo J. Hagerty of the County of Erie, by Maurice Frey, Assistant District Attorney, *amicus curiae*, in support of the application of the petitioner, and Samuel Fleischman, Esq., attorney for the respondent Hon. Hamilton Ward, Jr., as County Judge, and Saft, Schweitzer & Sullivan by Ralph Saft, Esq., attorneys for the respondent Joseph Paterno, in opposition to the application of the peti-ioner and due deliberation having been had, and upon my memorandum herein it is

Ordered that the application of the petitioner be and the same hereby is in all respects, granted, and it is further

[fol. 4] Ordered that the Hon. Hamilton Ward, Jr., as Judge of the County Court of Erie County be, and he hereby is, prohibited from vacating the judgment of the Erie County Court entered the 16th day of July, 1937 in an action entitled "People of the State of New York v. Joseph Paterno", and that said respondent be, and he hereby is, enjoined and restrained from taking any of the affirmative steps proposed to be taken by him in accordance with his

opinion dated March 20, 1946 herein and in the petition referred to.

Paul J. Batt, J. S. C.

Granted: July 29, 1946. R. E. Byron, Spec. Dep. Clerk. (Seal.)

Attorney Genl.—No Fee.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 5] In Supreme Court of New York, County of Erie

(Same Title)

Nathaniel L. Goldstein, Attorney General (Emil L. Cohen, Assistant Attorney General, of Counsel) for Petitioner.

Leo J. Hagerty, District Attorney of the County of Erie, *Amicus Curiae* (Maurice Frey, Assistant District Attorney, of Counsel).

Samuel M. Fleischman for Respondent, Hon. Hamilton Ward, Jr., as Erie County Judge.

Saft, Schweitzer & Sullivan (Ralph Saft, of Counsel) for Respondent, Joseph Paterno.

Memorandum

Batt, J.:

This is a proceeding brought under Article 78 of the Civil Practice Act by the Commissioner of Correction of the State of New York, John A. Lyons, for an order directed to the Honorable Hamilton Ward, Jr., as Judge of the County Court of Erie County, to prohibit him from vacating a judgment of the Erie County Court against the respondent, [fol. 6] Joseph Paterno. The respondent Judge of the Erie County Court has moved to dismiss the petition as a matter of law, upon the ground that it does not state facts sufficient to constitute grounds for the relief sought, and the respondent, Joseph Paterno, has interposed an answer to the petition which does now dispute the facts of the case.

Joseph Paterno was indicted by the Grand Jury of Erie County on October 30, 1936 for the crime of criminally receiving stolen property. On November 10, 1936, he was arraigned and pleaded not guilty in the presence of his

counsel. On April 14, 1937 the respondent Paterno again appeared in Court, withdrew his former plea of not guilty and pleaded guilty to attempted grand larceny, second degree. The plea was accepted by the Court after the District Attorney recommended "that the defendant be permitted to plead guilty to the reduced charge of attempted grand larceny, second degree." On July 16, 1937 the respondent Paterno was sentenced to a term of 1 year and 3 months to 2 years and 6 months, execution of which sentence was suspended and respondent Paterno was placed on probation to make restitution of $75.00.

Subsequently, on November 17, 1941, the respondent Paterno was sentenced to Attica Prison by the Chautauqua County Court upon his plea of guilty to the crime of robbery, second degree, to a term of not less than 15 years nor more than 30 years as a second offender. The 1937 conviction of the respondent Paterno in the Erie County Court [fol. 7] was used as a basis for making him a second offender. The respondent Paterno is still serving the Chautauqua County Court sentence in Attica Prison, which sentence by its terms has not expired.

Prior hereto the respondent Paterno commenced a habeas corpus proceeding in the Wyoming County Court, contending that his Chautauqua County sentence was irregular, in that his prior conviction in the Erie County Court was illegal. The claimed ground of illegality was the same ground which is now urged in this Court, to-wit; that the Erie County Court improperly accepted a reduced plea of grand larceny, second degree, under an indictment for criminally receiving stolen property. The Wyoming County Court upheld the contention of the respondent Paterno and remanded him to Chautauqua County Court for resentence. An appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, from the order of the Wyoming County Court. The Appellate Division reversed the Wyoming County Court order and directed that the respondent Paterno be remanded to Attica Prison under the Chautauqua County Court Sentence. The decision of the Appelate Division was based upon the Court of Appeals decision in the case of People *ex rel.* Wachowicz v. Martin, 293 N. Y. 361, which had been decided in the interim.

The respondent Paterno is now making a motion in the Erie County Court to vacate the judgment entered upon his plea of guilty in 1937, upon the same ground heretofore

[fol. 8] urged, to wit: that the Erie County Court improperly accepted the reduced plea of grand larceny, second degree, under an indictment for criminally receiving stolen property. The respondent Erie County Judge Hamilton Ward, Jr., has indicated in an opinion dated March 20, 1946, that he was about to grant the motion of the respondent Paterno, but suggested that this proceeding be brought to test the question of whether or not he had jurisdiction to grant the motion. Accordingly, this proceeding has been brought, in the nature of prohibition, to enjoin the Erie County Judge from proceeding with any of the steps proposed to be taken by him, as indicated in his opinion of March 20, 1946.

A temporary restraining order has been made herein pending the determination of this proceeding.

The facts in this case are identical with those in Wachowicz v. Martin, 293 N. Y. 361. In that case as in this, the defendant claimed that the judgment of conviction was in violation of Article 1, § 6 of the Constitution, providing "no person shall be held to answer for a capital or otherwise infamous crime unless on indictment of a grand jury." The Court of Appeals dismissed a writ of habeas corpus in the Wachowicz case.

The respondent in this case prays the Court to vacate and set aside the judgment of conviction under the inherent power of the Court to correct its own judgment under the authority of Lyons v. Goldstein, 290 N. Y. 19. In that case the Court held the judgment was a nullity. In the Wacho- [fol. 9] wicz case the Court of Appeals held that the judgment of conviction was not a nullity, but merely erroneous. The Court stated at page 365 as follows:

> "Though the judgment of conviction of the charge of attempted grand larceny is erroneous, the question remains whether it is a nullity and whether a person held thereunder may challenge the lawfulness of his detention by writ of habeas corpus. That question was not presented in People v. Miles (289 N. Y. 360) for there the judgment finding the defendant guilty was challenged and was reversed on appeal from the judgment. In People *ex rel.* Battista v. Christian (249 N. Y. 314) no criminal prosecution had been commenced by presentment or indictment of the Grand Jury and the court for that reason was forbidden by the Constitution to hold the relator to answer for *any* infamous

crime and had no jurisdiction to pronounce judgment finding the relator guilty of any such crime. The judgment in that case was not based upon an erroneous judicial ruling in a pending judicial proceeding. It was based upon a ruling of a judge before whom no judicial proceeding was pending. Such a judgment is, of course, a nullity, and a person restrained thereunder is entitled to discharge upon the hearing of a writ of habeas corpus. Here the judgment is based upon a ruling by the court in a judicial proceeding which had been commenced by an indictment of the Grand Jury and which was pending in the County Court of Erie [fol. 10] County when judgment was entered. The County Court of Erie County which pronounced sentence has general jurisdiction both of the crime charged in the indictment and of the crime of which the relator has been found guilty, and had jurisdiction of the person of the relator when he was arraigned upon that indictment and pleaded not guilty to the indictment, and when the relator withdrew that plea and offered to plead guilty to attempted grand larceny second degree under the second count of the indictment. * * * Error there may be corrected by appeal, but the judgment entered upon an erroneous determination of a question of law by a court of competent jurisdiction is not a nullity, and may not be challenged by a writ of habeas corpus."

Under an identical state of facts as existed in the Wachowicz case, the respondent in this case, acknowledging that his conviction may not be challenged by a writ of habeas corpus has applied to the County Court of Erie County to exercise its inherent power to vacate the first judgment of conviction against him.

The question presented upon this motion is: Has the County Court of Erie County jurisdiction under its inherent power, to correct a judgment which is not a nullity but is merely erroneous?

Prior to the Goldstein case, the Court of Appeals had not passed directly upon the question whether the court of original jurisdiction had inherent power to correct mistakes or errors in its judgments in criminal cases, upon a motion [fol. 11] to vacate same. In that case the Court of Appeals stated at page 25:

"The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted (Furman v. Furman, 153 N. Y. 309; Matter of Holden, 271 N. Y. 212). No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis*."

In what cases under the common law was a writ of error *coram nobis* granted?

"A writ of error *coram nobis* is an ancient, almost obsolete common-law writ used to obtain the review of correction, *on account of some error of fact*, (emphasis ours) of a judgment entered by the court awarding the writ, the entire proceeding although applicable to criminal cases, being in the nature of a new civil suit."

It was devised "to bring before a court a judgment previously rendered by it for the purpose of review or modification, *on account of some error of fact* (emphasis ours) and not of law affecting the validity and regularity of the [fol. 12] proceedings, and which was not brought into issue at the trial thereof. At common law it performed omnibus functions to call attention to a trial court of its errors and to give such court an opportunity to correct them. The purpose of the proceeding is to have the judgment declared void and vacated, or to obtain other relief therefrom by showing error of fact." • • •

"The writ differs from an ordinary writ of error in that it does not remove the case to a higher court for review and that it lies only for errors of fact not apparent of record instead of only for errors of law apparent of record."

It lay "to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of accused, and without negligence on his part, he has been

deprived of a defense which he could have used at the trial, or where facts have been concealed at the trial, which if known would have prevented a conviction."

It did not lie "where there is another remedy, or by motion for a new trial, or in arrest of judgment, appeal."

26 *Corpus Juris Secundum*, § 1606, pp. 143-147.

As Justice Hughes stated in United States v. Mayer, 235 U. S. at page 69 in connection with the jurisdiction to grant a writ of error *coram nobis*, "This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, [fol. 13] in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." See also Camp v. Bennett, 16 Wend. p. 51.

That only errors of fact may be considered upon a motion to vacate a judgment is indicated in Matter of Morhous v. N. Y. Supreme Court, 293 N. Y. at page 140:

> "Controverted questions of fact whether the relator is deprived of his liberty without due process can be determined by a motion to vacate the judgment made in the court which granted it."

To the same effect is Hogan v. Supreme Court reported in New York Law Journal Feb. 7, 1946 in which Judge Desmond says:

> "One of the incidental powers which every competent court needs, and must have, to carry out effectually its specific statutory powers, is the power to strike from its records judgments which are void for fraud, not merely erroneous in law."

The same reasoning appears by inference in People v. Gersewitz, 294 N. Y. 163 which was an appeal from an order denying a motion to vacate a judgment of conviction. The Court stated (page 167):

> "The court has nonetheless recognized, at the same time, that courts have always asserted and exercised authority which, though perhaps not expressly established by statute, is based upon the inherent right [fol. 14] and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent op-

pression or persecution. 'It is a power,' the court said, 'which the legislature can neither curtail nor abolish, and to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional' * * *. We have sanctioned the exercise of such a power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional right of a party. *Perhaps that power can have no broader scope.*" (Emphasis ours.)

The record before the County Court now is the same record that was before it at the time of respondent's first conviction. There is no necessity for its correction. The only error claimed is one of law in that the court, the district attorney and the respondent assumed that the crime of attempted grand larceny was a lesser degree of criminally receiving stolen property. There was no error of fact which would justify a writ of error *coram nobis* or a motion to vacate the judgment. In the Goldstein case there was fraud which did not appear upon the record. In the Gersewitz case there was a claim that the defendant had not been appraised of his right to have counsel. The Hogan case was one in which fraud was involved.

Subject only then to the inherent power of the court to correct its judgments or to vacate them for error in fact [fol. 15] such as fraud, the practice in criminal cases is governed by the Code of Criminal Procedure (People v. Gersewitz, *supra*).

§515 of the Code of Criminal Procedure provided:

"* * * hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding, or special proceeding of a criminal nature, is by appeal.

§331: "* * * the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial under the plea of not guilty, and in arrest of judgment."

§467: "A motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former

conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section 331."

In the Wachowicz case, the Court of Appeals decided that under the circumstances involved in this case, there was no violation of the constitutional provision requiring an indictment and that the plea of the respondent in this case compares with a situation where the facts stated in the indictment do not constitute a crime.

It is claimed that respondent was convicted without due process of law. There was no violation of the "due process" clause in this case, the respondent could have moved in arrest of judgment after his plea of guilty on the ground [fol. 16] that the facts stated in the indictment did not constitute a crime.

In the absence of a motion to dismiss the indictment or in arrest of judgment and an appeal, the question of the sufficiency of the indictment cannot be raised (People v. Hammersmith, 229 A. D. 385; People v. Willett, 213 N. Y. 368; People v. Wiechers, 179 N. Y. 459). Nor could a writ of error *coram nobis* lie (24 *Corpus Juris Secundum*, p. 147).

That the respondent in this case, in the absence of error in fact, justifying the vacation of the judgment of conviction, is confined to the remedies provided in the Code of Criminal Procedure upon an error of law is made strikingly clear in People v. Rizzo, 246 N. Y. 334. In that case, four defendants had been convicted of attempted robbery. Only Rizzo appealed. The Court of Appeals held that the evidence had failed to establish the crime of attempted robbery and reversed the conviction of Rizzo. The Court held that the others who did not appeal, had no remedy except to apply for executive clemency stating "as the others did not appeal, there is no remedy for them through the courts."

Although the courts should be zealous to protect the constitutional and legal rights of each individual, the protection of the general public should not be jeopardized.

The respondent in this case was denied no constitutional or legal right. There was no fraud in connection with his [fol. 17] conviction. He was not induced through any unfair methods to plead guilty. He was given a privilege to accept a reduced plea. He was placed on probation and

never served one day of his original sentence. As was said in the Wachowicz case "He sought and obtained the benefit that might accrue to him from a finding of guilt for a crime connected with the same transaction, though not necessarily included in the crime charged in the indictment * * * and the defendant who asked the court to render an erroneous judgmetn in a pending judicial proceeding may not thereafter when it suits his convenience, challenge the judgment." Notwithstanding the leniency afforded him, a few years later he was indicted for the crime of robbery in the first degree. Again he was permitted to plead to a lesser crime. The Legislature in its wisdom in order to protect the general public against its predators provided for increased penalties for persistent violators of the law. The respondent is now serving a sentence as a second offender and he should not be released at this time to prey again upon the public.

Courts not of record as well as courts of record possess an inherent power to vacate their judgments (Hogan v. Supreme Court, *supra*). The order vacating or not vacating the judgment is not appealable (People v. Gersewitz, *supra*). A most chaotic condition will result in the criminal practice of this state, if judgments not a nullity, but merely erroneous can be vacated by courts of original jurisdiction. [fol. 18] The order of prohibition prayed for in the petition herein is granted.

Dated: July 1, 1946.

Paul J. Batt (S), Justice of Supreme Court.

IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

NOTICE OF MOTION FOR THE PROHIBITION ORDER

(Same Title)

SIRS:

Please Take Notice that upon the annexed petition of the Commissioner of Correction of the State of New York, verified the 29th day of March, 1946, the undersigned will move before a Special Term of this Court, Part I thereof, to be held in and for the County of Erie, at the County Hall in the City of Buffalo, New York, on the 9th day of

April, 1946 at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard for an order prohibiting the respondent, Honorable Hamilton Ward, Jr., as Judge of the County Court of Erie County, from vacating the judgment of the Erie County Court entered the 16th day of July, 1937, in an action entitled "People of the State of New York against Joseph Paterno," and enjoining and restraining said respondent from taking any of the affirmative steps proposed to be taken in accordance with the opinion of the respondent, Honorable Hamilton Ward, Jr., dated March 20, 1946 and referred to in the [fol. 19] petition annexed hereto, and for such other, further, and different relief as to the court may seem just and proper.

Dated, Buffalo, N. Y., March 29, 1946.

Yours, etc., Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Petitioner, Office and Post Office Address, State Office Building, 65 Court Street, Buffalo, N. Y.; Leo J. Hagerty, Esq., District Attorney of the County of Erie, Amicus Curiae, Office and Post Office Address, Erie County Hall, Buffalo, New York..

To Honorable Hamilton Ward, Jr., Judge of the Erie County Court, County Hall, Buffalo, New York; Mr. Joseph Paterno, Respondent, Box 149, Attica, New York.

[fol. 20] In Supreme Court of New York, County of Erie

Petition

(Same Title)

To the Supreme Court of Erie County:

The petition of John A. Lyons, as Commissioner of Correction of the State of New York, respectfully shows to this Court, upon information and belief, as follows:

1. That the petitioner is the duly appointed Commissioner of Correction of the Department of Correction of the State of New York, and as such is charged with the duty of enforcing the criminal commitments of the courts of the State of New York.

2. That the respondent, Honorable Hamilton Ward, Jr., is a duly elected Judge of the County Court of the County of Erie.

3. That on the 17th day of November, 1941, the respondent, Joseph Paterno, was sentenced to Attica State Prison by the Chautauqua County Court, upon his plea of guilty to the crime of second degree robbery, to a term of not less than 15 years nor more than 30 years as a second offender. That the respondent, Joseph Paterno, was received in Attica State Prison pursuant to said sentence on November 17, 1941, and that he is still at Attica State Prison serving said sentence, which has not expired. That the sentence of the respondent, Joseph Paterno, as a second offender, was based upon his prior conviction for the crime of attempted grand larceny, second degree, in the Erie County Court on July 16, 1937.

[fol. 21] 4. That annexed hereto, marked Exhibit "A", and made a part hereof, is a copy of said judgment of conviction in Erie County Court. That annexed hereto, marked Exhibit "B", and made a part hereof, is a copy of the indictment in connection with the judgment of conviction set forth in Exhibit "A". That annexed hereto, marked Exhibit "C", and made a part hereof, is a copy of the recommendation of the District Attorney of Erie County to the court with respect to the plea referred to in Exhibit "A".

5. That heretofore the respondent, Joseph Paterno, made a motion on or about the 2nd day of January, 1946 before the respondent, Honorable Hamilton Ward, Jr., for an order vacating and setting aside the conviction of the respondent, Joseph Paterno, set forth in Exhibit "A", and for leave to withdraw the plea of guilty interposed by said respondent, and for leave to plead *de novo*. That on the 20th day of March, 1946, the respondent, Honorable Hamilton Ward, Jr., rendered a written opinion dated said date, which opinion will be submitted to the court and is made a part hereof by reference, and in which opinion said respondent provided, among other things, that "the motion is granted," but that the signing and entry of the formal order would be withheld until the 30th day of March, 1946 for the purpose of giving the District Attorney of Erie County or the Attorney-General of the State an opportunity "to proceed against this Court by writ of prohibition or otherwise."

[fol. 22] 6. That the threatened action of the respondent, Honorable Hamilton Ward, Jr., to vacate the judgment set forth in Exhibit "A" is in excess of the jurisdiction of the Court and of said respondent. That the Erie County Court is without authority at this time to vacate the judgment set forth in Exhibit "A" and to allow the respondent, Joseph Paterno, to withdraw his plea of guilty set forth therein, and to permit him to enter a plea of not guilty in its place and stead. That the judgment of the Erie County Court set forth in Exhibit "A" was a legal and proper judgment; that at the time that the same was imposed, the sentencing court had jurisdiction of the person of the respondent, Joseph Paterno, and of the crime for which he was indicted, and of the crime to which he pleaded guilty, and that the sentence imposed was one within the legal power of the court to impose; that the period of probation set forth in said judgment has expired; that the sentencing court is now without jurisdiction to set aside or alter said judgment.

7. That in the event that the respondent, Honorable Hamilton Ward, Jr., pursues the course of action threatened, no appeal from the determination will lie therefrom. That there is no adequate remedy available to prevent the taking of the unauthorized action threatened by respondent, Honorable Hamilton Ward, Jr., except the relief sought herein.

8. That no previous application for the relief sought herein has been made.

[fol. 23] Wherefore, the petitioner requests that this Court issue its order directed to the respondent, Honorable Hamilton Ward, Jr., prohibiting said respondent from vacating the judgment set forth in Exhibit "A" and pursuing the other acts proposed to be taken by said respondent, in accordance with his opinion dated March 20, 1946 hereinbefore referred to, and enjoining and restraining said respondent from taking any affirmative steps in connection therewith, and for such other, further, and different relief as to the Court may seem just and proper.

Dated, March 29, 1946.

John A. Lyons, Commissioner of Correction.

(Verified by Emil L. Cohen, March 29, 1946.)

[fol. 24] EXHIBIT "A" TO PETITION

Certified Copy of Judgment . . . Imprisonment

Sec. 486 Crim. Code

At a Term of the County Court, Held in and for the County of Erie, at the Erie County Hall, in the City of Buffalo, on the 16th Day of July, 1937

Present: Hon. F. B. Thorn, Judge.

16725

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

JOSEPH PATERNO, Defendant

Viol. Sect. 1308 P. L.

The defendant above named having pleaded guilty in this Court, on the 14th day of April, 1937, of the crime of Attempted Grand Larceny 2nd degree, personally appears this day for judgment. The defendant is now asked by the Clerk of this Court whether he has any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged or appearing to this Court why such judgment should not be pronounced, judgment is thereupon pronounced that the said defendant be imprisoned at hard labor in the N. Y. State Prison at Attica, N. Y., for the term of not less than 1 yr. 3 mo. nor more than 2 yrs. 6 mo. Ex. of Sent. suspended. Placed on probation to make [fol. 25] restitution $75.00 cash balance as determined by Prob. Dept.

The defendant testifies that he is 24 years of age, and was born in Raymond, Wash., and is by occupation a Barber.

I Hereby Certify the foregoing to be a true copy of the entry of judgment upon the minutes in the above-entitled action.

Witness my hand and the seal of said Court this 17th day of November, 1943.

A. S. Titus, Deputy County Clerk, of Erie County.
(Seal.)

F5-29-6C-3-43-B. P.

3—583

EXHIBIT "B" TO PETITION

County Court, Erie County

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH PATERNO

The Grand Jury of the County of Erie, by this indictment, accuse Joseph Paterno of the following crime: Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno, on or about the 5th day of October, 1936, at the City of [fol. 26] Tonawanda, in this County, feloniously brought, received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop.

Walter C. Newcomb, District Attorney of the County of Erie. O. K.—P. J. N.

[Endorsed:] No. 16725. County Court, Erie County, October Term, 1935-6. The People against Joseph Paterno, Indictment. Oct. 30, 1936. Violation of Section 1308 of the Penal Law. Walter C. Newcomb, District Attorney.

A True Bill. Frank R. Layor Foreman. Arraigned the 10 day of Nov. 1936. Plead Not Guilty. Counsel J. Bleichfeld. Filed 30th day of Oct. 1936. James V. Walsh, Spec. Dep. Co. Clerk.

[fol. 27] Let to bail Thorn J. on the 10th day of Nov. 1936, in the sum of $2500.00.

2/16/37.

Sentenced to be imprisoned in the N. Y. State Prison, Attica at hard labor for the term of 1 year 3 months, minimum and 2 years 6 months, maximum.

Ex. of sent. suspended placed on probation.

To make restitution 75.00 cash balance as determined by probation dept.

Thorn, J.

4/14/37. Defendant appeared in person withdraws former plea of not guilty and now pleads guilty to Attempted Grand Larc. 2nd degree.

EXHIBIT "C" TO PETITION

County Court, Erie County

Ind. #16,725

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH PATERNO

The above named defendant was indicted on a charge of Criminally Receiving Stolen Property. Only a very small [fol. 28] portion of the stolen property was recovered and that was found in the possession of several admitted inmates of a disorderly house who are of necessity the chief witnesses for the People in this case. For these reasons and because of the character of these witnesses, it is recommended that the defendant be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree.

Walter C. Newcomb, District Attorney of the County of Erie.

Dated: April 14, 1937.

IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

ANSWER

(Same Title)

The Respondent Joseph Paterno answering the petition herein by Saft, Schweitzer & Sullivan, his attorneys, and alleges as follows:

1. Admits allegations of the petition herein marked "2", "3", "4", "5", and "6", except that part of paragraph "6" which states "that at the time that the same was imposed, the sentencing court had jurisdiction of the person of the respondent, Joseph Paterno, and of the crime for which he was indicted, and of the crime to which he pleaded guilty, and that the sentence imposed was one within the legal power of the court to impose," all of which said respondent denies.

[fol. 29] 2. That he has no knowledge or information sufficient to form a belief as to allegations marked "1" of the petition.

3. Denies each and every allegation of the petition and every part thereof not hereinbefore specifically admitted, controverted or denied.

As and for a First, Separate and Distinct Defense Herein, the respondent Joseph Paterno, further alleges:

4. That prior to his indictment by the Grand Jury of Erie County on October 30th, 1936, he was arraigned in the City Court of Buffalo on an information which charged him with the crimes of burglary 3rd and grand larceny, but pending a hearing the matter was presented directly to the Grand Jury in the form of a single charge only, namely, criminally receiving stolen property, in violation of Section 1308 of the Penal Law. This was the only charge presented to the Grand Jury for its consideration, and the Grand Jury handed up an indictment on said charge for criminally receiving stolen property, in violation of Section 1308 of the Penal Law. No charge of burglary or grand larceny was submitted to the Grand Jury.

5. That the said respondent Joseph Paterno appeared in Part 2 of the Erie County Court on April 14th, 1937 to answer for said crime for which he had been indicted, and was allowed to plead guilty to attempted grand larceny second degree.

6. That the motion herein to set aside said judgment was addressed to the same court in Part 2 of the Erie County [fol. 30] Court and said court retained an inherent jurisdiction over its judgment and after hearing the petitioner therein, the respondent Joseph Paterno, by Saft, Schweitzer & Sullivan, his attorneys (Ralph Saft, Esq., of counsel) and the People of the State of New York by Leo J. Hagerty, Esq., (Maurice Frey, Esq., of counsel), have after the court rendered a written decision consented among other things that the motion be granted.

As and for a Second, Separate and Distinct Defense Herein, the respondent Joseph Paterno, further alleges:

7. That when the respondent Joseph Paterno pleaded

guilty to attempted grand larceny second degree on April 4th, 1937 and the court entered judgment therein, the court was without jurisdiction to accept said plea and to enter said judgment, because the said respondent Joseph Paterno had not been indicted by a Grand Jury for said crime or any other crimes which embodied the elements of the crime or attempted grand larceny second degree.

Wherefore, said respondent Joseph Paterno respectfully demands that the petition herein be dismissed.

Saft, Schweitzer & Sullivan, Attorneys for Respondent; Joseph Paterno, Office & P. O. Address, Suite 502-03, 17 Court St. Bldg., Buffalo, New York.

[fol. 31] To Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Petitioner, Office & P. O. Address, State Office Building, 65 Court St., Buffalo, N. Y.; Leo J. Hagerty, Esq., District Attorney of the County of Erie, Amicus Curiae, Office & P. O. Address, Erie County Hall, Buffalo, New York.

(Verified by Ralph Saft, April 5 ,1946.)

In Supreme Court of New York, County of Erie

Notice of Motion to Dismiss Petition

(Same Title)

Sirs:

Please Take Notice, that upon the notice of motion herein dated March 29, 1946, and the petition of John A. Lyons as Commissioner of Corrections of the State of New York sworn to March 29, 1946, upon which the said notice of motion was based, a motion will be made at Special Term of the New York Supreme Court held in and for the County of Erie at the County Hall in the City of Buffalo, N. Y. on the return day of this proceeding, to wit, April 9, 1946, at ten o'clock in [fol. 32] the forenoon of said day, or as soon thereafter as counsel can be heard, for an order dismissing the petition herein as a matter of law, upon the ground that it appears upon the face of said petition that the same is insufficient in

law in that it does not state facts sufficient to constitute grounds for the relief sought herein.

Dated, Buffalo, N. Y., April 4, 1946.

Yours, etc., Samuel M. Fleischman, Attorney for Respondent Hon. Hamilton Ward, Jr., as Judge of County Court of Erie County, 916 Prudential Bldg., Buffalo, N. Y.

To Hon. Nathaniel L. Goldstein, Attorney General, State of New York; Hon. Leo J. Hagerty, District Attorney, Erie County.

[fol. 33] In County Court of Erie County

The People of the State of New York,

against

Joseph Paterno

Appearances:

Saft, Schweitzer & Sullivan, Attorneys for defendant, Ralph Saft, of counsel, in support of the motion.

Leo J. Hagerty, District Attorney of the County of Erie, Maurice Frey, Assistant District Attorney, of counsel, opposed.

Opinion

Ward, J.:

This is a motion for an order: (1) vacating and setting aside an erroneous conviction of the defendant herein on the 14th day of April, 1937, of the crime of Attempted Grand Larceny 2nd degree; (2) for leave to withdraw the defendant's plea of guilty and to interpose a plea of not guilty; (3) for leave to plead *de novo* * * *".

Joseph Paterno was indicted by the grand jury of Erie County on October 30th, 1936, for the sole indictable offense of Criminally Receiving Stolen Property, in violation of Section 1308 of the Penal Law. Upon arraignment in County Court, he pleaded "not guilty". On April 14th, 1937, the then District Attorney filed a recommendation with the County Court that the defendant be permitted to plead "guilty" to the crime of Attempted Grand Larceny [fol. 34] 2nd Degree. The defendant so pleaded and was

sentenced to Attica Prison for an indefinite term of not less than one year and three months and not more than two years and six months. The execution of this sentence was suspended and the defendant was placed on probation. No appeal was taken from this judgment, and on December 1st, 1938, the defendant was discharged from probation.

On November 17th, 1941, the defendant was indicted by a grand jury in Chautauqua County for the crime of Robbery in the 1st Degree. He pleaded guilty to Robbery in the 2nd Degree in the County Court of that county. An information was filed against him, by the District Attorney of Chautauqua County, charging him with being the same person convicted of the crime of Attempted Grand Larceny, 2nd Degree in Erie County on April 14th, 1937. He admitted that he was the same person, and as a second felony offender was sentenced to Attica Prison for a term of not less than fifteen years nor more than thirty years. This judgment was placed in execution.

Thereafter followed a series of applications and motions, the dates of which are significant.

On September 10th, 1943, he moved in the County Court of Chautauqua County for an order to correct the information filed accusing the defendant of being the same person convicted in Erie County on April 14th, 1937. The motion was denied (People vs. Paterno, 182 Misc. 491, 50 N. Y. S. 2nd 713).

[fol. 35] November 22nd, 1943, the defendant applied for relief from imprisonment by a writ of habeas corpus to the County Court of Wyoming County, challenging the validity of the Erie County judgment of conviction. The writ was dismissed, but the relator was remanded to the custody of the sheriff of Chautauqua County for resentence as a first offender upon the determination by the County Court of Wyoming County that the Erie County judgment was invalid. This order was entered on January 8th, 1944, undoubtedly on the authority of the People *ex rel.* Wachowicz vs. Martin (267 A. D. 803, 47 N. Y. S. 2nd 291), decided December 30th, 1943, by the Appellate Division of the Supreme Court, Fourth Department, but subsequently reversed in People *ex rel.* Wachowicz vs. Martin (293 N. Y. 361, 57 N. E. 2nd 53), hereinafter referred to.

The County Judge of Chautauqua County resentenced Paterno as a first offender to time already served, a period of about two years. From the above order of the Wyoming

County Court the People and the Warden of Attica Prison appealed. In November 22nd, 1944, the now famous case of People *ex rel.* Wachowicz vs. Martin (293 N. Y. 361, 57 N. E. 2nd 53), having been decided by the Court of Appeals on July 19th, 1944, the Appellate Division of the Fourth Department reversed the order of the County Judge of Wyoming County so far as appealed from and remanded the relator to the custody of the warden of Attica Prison for the reasons stated in the Court's memorandum in the [fol. 36] Tracher case (People *ex rel.* Tracher vs. Martin, 268 App. Div. 955, 51 N. Y. S. 2nd 676). In that case the court said, "We think we are precluded from considering these questions by the decision of our Court of Appeals in People *ex rel.* Wachowicz vs. Martin, 293 N. Y. 361, 57 N. E. 2nd 53, which held, in substance, that the validity of the judgment of conviction, under the circumstances, could not be challenged by habeas corpus." No appeal was taken.

The relator being remanded thereby, the original sentence of the County Court of Chautauqua County was reinstated.

Then, on the 11th day of September, 1945, the defendant again moved the County Court of Chautauqua County to correct the information on the grounds that the Erie County judgment was erroneous. This motion was denied.

Now, finally, and on the 27th day of November, 1945, there comes this present motion before this Court.

As to the matter before this Court, it should be kept clearly in mind that this motion is not an application for relief by way of habeas corpus. That a writ will not lie herein is not to be questioned, (People *ex rel.* Wachowicz vs. Martin, 293 N. Y. 361, 57 N. E. 2nd 53) hereinafter referred to as the Wachowicz case. Also, it must be kept in mind that this defendant is not now, nor ever has been confined by virtue of the judgment of the Erie County Court pronounced July 16, 1937, except so far as the conviction thereunder constituted a first felony offense, so as to require a [fol. 37] mandatory increased punishment (Sec. 1941 Penal Law, as amended by L. 1920 c. 571, S2; L. 1936 c. 457, s1, L. 1936 c. 70, s1; L. 1936 c.328, s6, in effect April 9th, 1936).

In the Wachowicz case the defendant pleaded guilty to attempted Grand Larceny 2nd Degree to a count in the indictment accusing him of the crime of Criminally Receiving Stolen property. The Court of Appeals held: "The crime of grand larceny is not necessarily included, for some essential elements of that crime are not essential elements

in the crime charged, and the facts alleged in the indictment, though sufficient to constitute the crime charged therein, would not be sufficient to constitute the crime of grand larceny'' (293 N. Y. 361, 365, 366). The Court also held that there is no statutory authority permitting the Court to amend the indictment to include an accusation of criminal acts independent of any accusation presented by the grand jury in the indictment, and citing People vs. Miles (289 N. Y. 360, 45 N. E. 2nd 910), decided December 11th, 1942, in which case such an amendment had been allowed by the trial court on motion of the People and with the consent of the defendant. The court therein determined that the indictment thus amended and upon which the appellant was convicted was no longer an accusation by a grand jury. Thus the defendant had been deprived of the rights granted to him by Article 1, subd. 6 of the Constitution of the State of New York, that, "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury * * *"

[fol. 38] In the Wachowicz case, by a sharply divided court, it was held that although the crime of attempted grand larceny 2nd degree is a crime not necessarily included in that charged in the indictment, namely, criminally receiving stolen property, the court had general jurisdiction both of the crime charged in the indictment and of the crime to which the defendant had pleaded guilty, and had jurisdiction of the defendant upon his arraignment and plea and in proper circumstances the trial court would have had power to render the judgment therein. It was held that the trial court erred in its determination of the question of law when it ruled that a plea to Attempted Grand Larceny 2nd Degree was a proper plea to an indictment charging Criminally Receiving Stolen Property. Thus, although the judgment was erroneous, the court had jurisdiction and the judgment was not a nullity and habeas corpus would not lie.

The judgment in the motion before this court is erroneous, although not a nullity; and habeas corpus will not lie.

Thus, one of the greatest remedies for relief from imprisonment known to the English, United States or New York State Law is not available to this defendant.

Did he ever have or has he now any relief from such an erroneous judgment?

It is urged by the People that the defendant should have [fol. 39] moved in arrest of judgment or taken an appeal.

As to both of these, it should be borne in mind that this judgment was entered on a guilty plea and that both of these are inconsistent with such a plea. Also, prior to the Wachowicz case the law seems to have been accepted by both prosecution and defendant's attorneys that a plea to Attempted Grand Larceny 2nd Degree was a proper plea to an indictment charging Criminally Receiving Stolen Property. The Wachowicz case established the law to the contrary.

A motion in arrest of judgment would not lie under Section 331 of the Code of Criminal Procedure (L. 1881 c. 442). That section limits such motions to a plea of *not guilty*. Nor would the defendant have prevailed in such a motion by Section 467 of the Code of Criminal Procedure, for although this section permits such a motion "on a plea or verdict of guilty," one can succeed only if he can establish one of the grounds in Section 331 of the Code of Criminal Procedure, and in this instance, the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime. In the Wachowicz case the court determined that the trial court had jurisdiction over the subject of the indictment and that the facts stated did constitute a crime. While the court in the Wachowicz case indicates that had the motions been made as provided in Sections 331 and 467 of the Code of Criminal Procedure, an appeal would have been the proper manner of correcting error on the part of the trial court, it is obvious that in the [fol. 40] present condition of the law as determined by the Wachowicz case the appellant could not have prevailed.

That leaves for consideration the question of appeal from the judgment itself, as provided by Section 515 of the Code of Criminal Procedure (as amended L. 1884 c. 372, s1. eff. May 28, 1884) which states, "and hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding, or special proceeding of a criminal nature, is by appeal."

In Morhous vs. Supreme Court, (293 N. Y. 131, 56 N. E. 2nd 79), the court said at page 140, "An appeal to a higher court is ordinarily the appropriate corrective process for error at the trial, and appearing in the record * * *" In that case a trial was had. That an appeal will not lie to a plea of guilty seems to be the determination of the court in People vs. Wright (263 App. Div. 1020, 33 N. Y. S. 2nd 1009). There the defendant had pleaded guilty to

robbery in the first degree and assault second degree. He appealed from the judgment of conviction and from an order of the County Court denying his motion to set aside the convictions on the ground of newly discovered evidence. The Appellate Division, after affirming the order of the County Court of Monroe County, concluded its memorandum by the court as follows:

1. No power to grant the defendant's motion in any phase is resident in the County Court.

2. Appeal from judgments denied as no appeal lies therefrom.

[fol. 41] As to the ruling of the court in (1), this case was decided before Lyons vs. Goldstein et al. (290 N. Y. 19, 47 N. E. 2nd 425), to be referred to herein at some length below. It would seem that the court held in (2) that no appeal would lie to a judgment of conviction entered upon a plea of guilty.

The statement of the writer in very learned dissenting opinion in the Wachowicz case is illuminating in this respect, wherein he says at page 369, "It is urged that the only available remedy was by appeal from the judgment of conviction. But one who pleads guilty may not appeal unless the judgment is totally void, and if it be void then he is entitled to habeas corpus." The majority of the court held that the judgment was not void. On the authority of this case, the judgment in the present case is not void, therefore, no appeal would have been available to this defendant on his guilty plea.

What other remedy has this defendant? The ancient writ of error *coram nobis* is not available, as this petitioner does not claim that his plea of guilty was induced by fraud.

It, therefore, appears that if this petitioner is to have any relief he must find it in this motion to vacate and set aside the erroneous judgment. That this court has power to grant such motions under certain circumstances is no longer to be questioned. In Lyons vs. Goldstein *et al.* (290 N. Y. 19, 47 N. E. 2nd 425), hereinafter referred to as the Goldstein case, it was held that, "The inherent power [fol. 42] of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted" (290 N. Y. 25). The Court then cited Furman vs. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629;

Matter of Holden, 271 N. Y. 212, 2 N. E. 2nd 631, and continuing said, "No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent power of the courts to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis*." The court, having previously discussed at some length Section 337 of the Penal Law and Section 2188 of the Penal Law, determined that Section 337 did not preclude the court from allowing a withdrawal of a guilty plea after judgment, and that Section 2188 did not apply to a judgment except in the circumstances set forth therein. In the present case, no consideration need be given to Section 2188 of the Penal Law, as the defendant was never confined by virtue of the judgment and cannot be confined by the judgment now. It is also interesting to note that in the Goldstein case no consideration was given to the question of an appeal.

In People *ex rel.* Hirschberg vs. Grange County Court (271 N. Y. 151, 155, 2 N. E. 2nd 521, 523), it was held that "there was nothing in the Code to prohibit a court from exercising its inherent power to correct mistakes and er- [fol. 43] rors in its judgment." Maybe the word "error" should not be given undue emphasis. However, it is the concern of this court to determine whether it has jurisdiction to correct an erroneous judgment, and such expression by the highest court of the state cannot be overlooked or lightly dismissed. It may be that the court was limiting its consideration to error by clerical mistakes and not error in law.

That the Court of Appeals did not consider the Goldstein case as limiting the circumstances in which a court of original jurisdiction has power to vacate its judgments is evident in People vs. Gersewitz (294 N. Y. 163, 61 N. E. 2nd 427), at page 167, wherein the court said, "The Court has nonetheless recognized, at the same time, that courts have always asserted and exercised authority, which, though perhaps not expressly established by statute, is 'based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives, and to prevent oppression or persecution.' 'It is a power,' the court said,

'which the legislature can neither curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional.' We have sanctioned the exercise of such power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional right of a party. Perhaps that power can have no broader scope. No case has been presented to the court in which the court was called upon to define its exact [fol. 44] limits, but in March, 1943, this court authoritatively decided (three judges dissenting) that a court of criminal jurisdiction has 'Inherent' power to set aside a judgment procured by fraud and misrepresentation and to permit a defendant to withdraw a plea of guilty induced by violation of his constitutional rights, (Matter of Lyons vs. Goldstein, 290 N. Y. 19, 47 N. E. 2nd 425, 146 A. L. R. 1422); and in Matter of Morhous vs. New York Supreme Court, 293 N. Y. 131, 56 N. E. 2nd 79, we held that a motion to vacate a judgment procured by violation of the defendant's constitutional rights is the corrective judicial process which is authorized by the law of the State to remedy the alleged wrong to the defendant and that it adequately meets the requirement of 'due process.' "

The Morhous case just referred to held, among other things, that the present motion is the corrective judicial process to vacate a judgment procured by violation of the defendant's constitutional rights.

The Goldstein case has been followed recently in Frank S. Hogan, as District Attorney of New York County vs. Supreme Court of the State of New York, reported in the New York Law Journal, February 7, 1946, wherein Desmond, J., speaking for the court held, "That Special Sessions is not a court of record does not deprive it of power to entertain *'coram nobis'* applications," and further, "Due process is lacking unless some corrective process is available to them (Mooney vs. Holohan, 294 U. S. 103, [fol. 45] 112, 113. Morhous opinion 293 N. Y. at page 315). A remedy there must be. The only approach to it must be by the only visible route—by motions addressed to the sentencing court."

That this court is not without eminent companionship in its belief that the power of a court to vacate its judgments has not been limited by the Goldstein case is found in the

remarks of the learned John A. Mullen, J., in People vs. Bertram M. Campbell, at the time he ordered a judgment of conviction against Campbell vacated and set aside. "I do not believe that the Court of Appeals intended to limit the inherent power of this Court over its judgment to cases involving fraud or misrepresentation on the part of an officer of the State depriving a defendant of due process of law. I believe the Court of Appeals merely intended that in a case of that nature this court has inherent power over its judgment, but the Court of Appeals did not by any means, as I read the case, decide that this court had not the same inherent power over its judgment in certain other cases. The Court of Appeals did not say what other cases it might apply to, but it certainly did not say that it could not apply to any other type of case, even though in the Gersewitz case it said it may not. We know that the Court of Appeals in those cases had before it only the facts in the case upon which it was passing."

This court does not agree with the conclusion of Judge Mullen in his reference to the Gersewitz case, as appears [fol. 46] from the interpretation of that case set forth above. The above determination by Judge Mullen was not appealed, as no appeal lies to a motion to vacate a judgment (People vs. Gersewitz, 294 N. Y. 162, 61 N. E. 2nd 427).

There can be no doubt that this defendant was deprived of the rights guaranteed to him by Article 1, subdv. 6 of the Constitution of the State of New York. He was indicted for Criminally Receiving Stolen Property. He was convicted of Attempted Grand Larceny 2nd Degree, a crime the commission of which is not necessarily included in that with which he is charged in the indictment, nor a crime of a degree inferior to that charged in the indictment, nor an attempt thereof. He was therefore convicted without due process of law. That the court had jurisdiction as determined in the Wachowicz case is not important. Due process may well be lacking, although jurisdiction exists. In the Wachowicz case the relator sought relief by habeas corpus. The court held that habeas corpus would not lie. This is a motion to vacate an admittedly erroneous judgment, whereby the defendant had been deprived of the rights guaranteed by the Constitution of the State. He has no other relief than this motion. If this be denied to him, he has been deprived of due process. There is no

statutory prohibition to the granting of this order, and this court in attempting to correlate the cases on the subject is constrained to believe that the law is leading to the ultimate determination that a court has inherent power to grant a motion to vacate and set aside its own criminal judgment at any time thereafter, upon its deter- [fol. 47] mination that the judgment is erroneous and that its entry has deprived the defendant of rights guaranteed to him by the Constitution and there is available to the defendant no other remedy.

This petitioner stands before this court without favor. There is nothing in his conduct to merit sympathy or consideration. Questions of law, however, must not be determined by favor or prejudice. The argument of the People that to grant this relief after so long a time would work a hardship on the People in gaining a conviction is without merit. The People are not without fault in making a recommendation to the Court in this matter. If the People were able to convict the defendant of the crime charged in the indictment, the duty rested on the District Attorney to proceed to present the accusation as found by the Grand Jury forthwith. If a bargain was made, both sides bargained. The argument of the People that many similar applications may be made to the courts if this motion be granted has no persuasive value. To the contrary, if this defendant is entitled to relief by this motion, others similarly situated may be equally entitled. It is further urged upon this court that it should proceed with great care and caution in arriving at a determination favorable to this petitioner, as the order of the court is not appealable.

That the determination herein have the benefit of review, this court urges the District Attorney of Erie County or the Attorney General of the State to proceed against this court by writ of prohibition or otherwise, and to that end [fol. 48] the signing and entry of the order herein will be withheld until the 30th day of March, 1946.

The motion is granted. Prepare and submit order accordingly.

Dated at Buffalo, New York, this 15th day of March, 1946.

—— ——, County Judge, Erie County.

HW; cf.

STIPULATION WAIVING CERTIFICATION

(Same Title)

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties in the above entitled action that the foregoing are true and correct copies of the Notice of Appeal, Order Appealed From, and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of Erie, and certification of the same is hereby waived, pursuant to Section 170 of the Civil Practice Act.

Dated: Buffalo, New York, August —, 1946.

Saft, Schweitzer & Sullivan, Attorneys for Respondent-Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Petitioner-Respondent.

[fol. 49] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an Order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant.

STATEMENT UNDER RULE 234

On July 1, 1946 Honorable Paul J. Batt, Justice of the Supreme Court, granted an order prohibiting the Honorable Hamilton Ward, Jr., as Erie County Court Judge from vacating the judgment of the Erie County Court entered the 16th day of July, 1937 in an action entitled "People of the State of New York vs. Joseph Paterno". On appeal by Joseph Paterno to the Appellate Division of the Supreme Court, Fourth Department, said order was unanimously affirmed. Joseph Paterno now appeals to this Court.

There has been no change of parties or attorneys except that the Honorable Carlton A. Fisher has been substituted for the Honorable Hamilton Ward, Jr., as Erie County Court Judge by order of the Appellate Division.

[fol. 50] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant.

NOTICE OF APPEAL TO THE COURT OF APPEALS

Please take notice that pursuant to leave granted by the Court of Appeals in the above entitled action by an order duly made and filed in the Office of the Clerk of that Court on the 2nd day of July, 1947, the above named respondent-appellant hereby appeals to the Court of Appeals from the judgment of affirmance herein entered in the office of the Clerk of the County of Erie on the 16th day of May, 1947, pursuant to the order of the Appellate Division of the Fourth Department duly entered herein, the judgment in all things unanimously affirmed the judgment of the Supreme Court of Erie County, entered herein on the 29th day [fol. 51] of July, 1946; and this appeal is from each and every part of said judgment.

Saft, Schweitzer & Sullivan, Attorneys for Respondent-Appellant, Office and P. O. Address, Suite 502-03, 17 Court St. Bldg., Buffalo, New York.

To: Nathaniel L. Goldstein, Attorney General of the State of N. Y., Attorney for Petitioner-Appellant, 65 Court Street, Buffalo, New York. Samuel M. Fleischman, as Amicus Curiae for the County Judge, Prudential Building, Buffalo, N. Y.

[fol. 52] IN COURT OF APPEALS OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the second day of July, A. D. 1947.

Present: Hon. John T. Loughran, Chief Judge, Presiding.

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant

ORDER GRANTING LEAVE TO THE RESPONDENT-APPELLANT TO APPEAL TO THE COURT OF APPEALS

A motion for leave to appeal to the Court of Appeals in the above cause being duly made upon the part of the respondent appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is granted.

John Ludden, Clerk (Seal.)

[fol. 53] At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 29th day of April, 1947.

Present: Hon. Marsh N. Taylor, Presiding Justice; Hon. William F. Dowling, Hon. Samuel J. Harris, Hon. Francis D. McCurn, Hon. William F. Love, Associate Justices.

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Respondent,

For an order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Appellant

ORDER APPEALED FROM

The above named Joseph Paterno, respondent in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Supreme Court, entered in the office of the Clerk of the County of Erie, on the 29th day of July, 1946, and the said [fol. 54] appeal having been submitted by Mr. Ralph Saft, of counsel for the appellant, and argued by Mr. Samuel M. Fleischman, as *amicus curiae* for the County Judge, and by Emil L. Cohen, of counsel for the respondent, and due deliberation having been had thereon

It Is Hereby Ordered, that the order so appealed from be, and the same hereby is affirmed without costs of this appeal to any party.

Opinion by Harris, J.

All concur.

Enter, Marsh N. Taylor.

Entered 30th day of April, 1947.

Herbert E. Wait, Clerk.

[fol. 55] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

No. 5664

No. 478/282

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction, etc., Petitioner-Respondent,

For an Order directed to HONORABLE HAMILTON WARD, JR., as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant

Argued November 13, 1946.
Decided April 30, 1947.

Present: Honorable Marsh N. Taylor, Presiding Justice. Honorable William F. Dowling, Honorable Samuel J. Harris, Honorable Francis D. McCurn, Honorable William F. Love, Associate Justices.

Appeal from Order of Erie Special Term, (Batt, J.,) prohibiting Ward, J. of Erie County Court, from taking [fol. 56] any affirmative steps for the vacating of a judgment of conviction against Joseph Paterno.

Order entered July 29, 1946.

APPEARANCES:

Messrs. Saft, Schweitzer & Sullivan, (Ralph Saft, Esq., of Counsel), Suite 502-03, 17 Court Street, Buffalo, N. Y., for Appellant Paterno.

Hon. Nathaniel L. Goldstein, (Emil L. Cohen, Esq., of Counsel), The Capitol, Albany 1, N. Y., for Petitioner.

Hon. Leo J. Hagerty, District Attorney of Erie County, (Morris Frey, Esq., of Counsel), County Hall, Buffalo 2, N. Y.

Samuel M. Fleischman, Esq., Prudential Building, Buffalo, N. Y., for Respondent, Judge of the County Court of Erie County.

OPINION FOR AFFIRMANCE

HARRIS, J.:

By resort to the provisions of Article 78, Civil Practice Act, the petitioner-respondent herein, as Commissioner of Correction of the State of New York, has secured an order in the nature of prohibition, restraining the County Court of Erie County and one of its Judges from proceeding further on the application of Joseph Paterno, respondent-appellant herein, which application, addressed to the County Court of Erie County, asks that Court and a Judge thereof to permit the said Paterno to withdraw a plea of guilt and to be permitted to plead anew to an indictment. Paterno [fol. 57] became a party to this proceeding by his answer to the petition of the Commissioner of Correction.

A Grand Jury of the County Court of Erie County, at the October 1936 Term of such County Court, returned an indictment against Paterno, accusing Paterno of the following crime:—"Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously bought, received, concealed and

withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop." Paterno was arraigned in the County Court on the 10th day of November, 1936, plead not guilty to the indictment, and subsequently on the 14th day of April, 1937, with the consent of the District Attorney of Erie County, in such County Court plead to such indictment guilty to the crime of attempted grand larceny second degree. On July 16, 1937, judgment and sentence of the Court was pronounced on such plea. The sentence was to State Prison for not less than one year and three months, and not more than two years and six months. The execution of such sentence was suspended and the defendant placed on probation. He did not move in stay of judgment, and no appeal was taken from the judgment. Paterno did [fol. 58] not serve any portion of the sentence in State Prison, and on December 1, 1938, he was discharged from probation.

On November 17, 1941, Paterno was indicted by a Grand Jury in Chautauqua County for the crime of robbery in the first degree. He was permitted to plead guilty to robbery in the second degree in the County Court of that County. The District Attorney of Chautauqua County, prior to his sentence on this robbery conviction, filed an information against him charging him with being a second felony offender because of the above described plea to attempted grand larceny in the second degree in Erie County on April 14, 1937. He admitted being the same person and, as a second felony offender, he was sentenced to State Prison for a term of not less than fifteen years, nor more than thirty years. This judgment was placed in execution and he is now serving the sentence thereunder in State Prison. Intermediate the sentence in the Chautauqua County Court and the beginning of the present proceeding the appellant has made various applications to be relieved from the effect of his plea to the crime of attempted grand larceny in Erie County, his objective being to avoid the penalty of being a second felony offender, which penalty was meted out to him in Chautauqua County as above stated. One of his applications was to correct the information laid by the District Attorney of Chautauqua County. This motion was denied, (People v. Paterno, 182 Misc. 491). He then applied for an order of habeas corpus. This application [fol. 59] was dismissed, but he was remanded to the cus-

tody of the Sheriff of Chautauqua County for resentence as a first offender. From such resentence the People and the Warden of the State Prison appealed; on such appeal the order to resentence was reversed by this Court on the authority of People ex rel. Wachowicz v. Martin, 293 N. Y. 361, and the relator (Paterno) remanded to the custody of the Warden of the State Prison. From this reversal, no appeal was taken. Later the defendant again moved the County Court of Chautauqua County to correct the information, and such motion was denied.

On the 27th day of December, 1945, Paterno applied to the County Court of Erie County and a Judge thereof for an order vacating the judgment entered upon his plea of guilty in Erie County in 1937, on the ground that the Erie County Court at that time improperly accepted a plea of attempted grand larcency second degree, under an indictment for criminally receiving stolen property. This motion came on to be heard before the Honorable Hamilton Ward, Jr., then a County Judge of Erie County, (now a Justice of the Supreme Court of the State of New York); after argument and due consideration, the County Judge wrote an opinion stating that he was about to grant the motion of the appellant (Paterno) and would permit Paterno to withdraw his plea of April 14, 1937, and make a new plea under the indictment for criminally receiving stolen property returned in the County Court of Erie County in October, 1936, under which indictment Paterno [fol. 60] had previously plead guilty to the crime of grand larceny second degree. At this point the proceeding now under review was begun on the application of the Commissioner of Correction of the State of New York. The Special Term of the Supreme Court of Erie County, in this proceeding, issued an order prohibiting the Judge of the County Court of Erie County from vacating the judgment of the Erie County Court entered on the 16th day of April, 1937, and from taking any affirmative steps which would permit Paterno to withdraw his plea of April 14, 1937, on which judgment was pronounced July 16, 1937. Such prohibition and restraint were granted on the ground that any such steps or action taken by the County Judge would be in excess of the authority of the County Court of Erie County and of any Judge thereof. (Civil Practice Act, Article 78, Sections 1283, 1284-(4), 1287, 1290; See In the Matter of Lyons, as Commissioner, etc., v. Gold-

stein, as Judge, etc., 290 N. Y. 19; People *ex rel.* Childs v. Extraordinary Trial Term, 228 N. Y. 463.)

The County Judge, as *amicus curiae*, and the appellant Paterno here attack such order of prohibition and ask its reversal on the ground that the County Court and the Judge thereof had the inherent power to grant the relief prayed for by Paterno on his motion in County Court, and which relief the County Judge indicated he would grant to Paterno. The *amicus curiae* and the appellant have argued at Special Term, and argue here, that the plea of guilt to the crime of attempted grand larceny second [fol. 61] degree and the judgment entered thereon, was erroneous (See People *ex rel.* Wachowicz v. Martin, 293 N. Y. 361) and that Paterno's constitutional rights were invaded by the entry of such judgment. They claim that the only remedy that Paterno has had, or has, is by the present motion; they assert that, having plead guilty, he never could have had relief from such judgment by a motion to vacate the same, or by appeal. Habeas corpus has not been, and is not, available to Paterno. (Matter of Morhous v. N. Y. Supreme Court, 293 N. Y. 131; People *ex rel.* Wachowicz v. Martin, 293 N. Y. 361.) There is authority that both a motion in arrest of judgment (Code of Criminal Procedure, Sections 467-469) and the right to appeal (Code of Criminal Procedure, Section 515) were both available to Paterno after his plea which is now under discussion. (People v. McDonnell, 92 N. Y. 657; Sherwin v. People, 100 N. Y. 351; Canizio v. N. Y., 66 Sup. Ct. Rep. 452, 453, 90 Law Ed. (Adv.) 393.) He failed to make such a motion, and he did not appeal from the judgment. The time for him to have taken either of these steps has long ago passed. Paterno is now asking the County Court to exercise what is termed its "inherent power" in his behalf by a process corresponding to the procedure on *coram nobis*. This early English process (Jacques v. Cesar, 2 Saunders (English) 100; Volume 2, Williams Notes on Saunders, pp. 293-345) has recently been the subject of discussion in the appellate courts of this State and in recent years in courts of sister-states (In the Matter of Hogan, as [fol. 62] District Attorney, v. Court of General Sessions, etc., and Shapiro, 296 N. Y. p. 1. (Advance Sheets No. 390); Matter of Hogan v. New York Supreme Court, etc. and Katz, et al., 295 N. Y. 92; In the Matter of Lyons, as Commissioner, etc. v. Goldstein, as Judge, etc., 290 N. Y. 19;

Sanders v. State, 85 Ind. 318; George v. State, 211 Ind. 429; Jones v. Commonwealth, 269 Ky. 772; 18 C. J. S. *Coram Nobis* p. 281; 24 C. J. S. Criminal Law, Section 1606) and it has been determined that in a proper case such an application (*coram nobis*) is cognizable by the court of original jurisdiction. An analysis study of the origin and history of the remedy known as "*coram nobis*" shows that in both the English courts and the courts of the United States it was, and has been available only to correct an error of fact, which error of fact is exclusively within the knowledge of the court of original jurisdiction; and that the remedy of *coram nobis* will only be invoked and used where there is no other remedy available to a person sentenced to and held in prison in violation of his constitutional rights. Its office is to avoid the effect of a fraud on the court and the one accused of crime, which fraud deprived the accused of his basic right of a fair trial by an impartial jury. It lies in the court of original jurisdiction because there is deposited the knowledge of the facts pertaining to and surrounding the conviction. So closely has the use of this remedy (*coram nobis*) been restricted, that it is not available, even where no other remedy exists, [fol. 63] to have set aside a plea on the ground of newly discovered evidence though such newly discovered evidence is unimpeached and goes to the essence of the guilt or innocence of the applicant. (Sanders v. State, 85 Ind. 318; George v. State, 211 Ind. 429; Jones v. Commonwealth, 269 Ky. 772. We have not here a situation that calls for the application of the remedy afforded by *coram nobis*. Here the appellant seeks to avoid a penalty placed on him by an error in law and not one of fact. Substantial errors of law prejudicial to a defendant, may be corrected on appeal; other errors of law need not be so corrected. (Code of Criminal Procedure, Section 452.). Appeal from a judgment of conviction in this State does not lie as a matter of constitutional right but solely by legislative enactment.

The appellant herein in the County Court of Erie County, after his indictment, sought and received a favor. He was in no way compelled or coerced into pleading to the crime of attempted grand larceny in the second degree. His indictment was for a crime cognizable by the County Court, and he himself was under the jurisdiction of the court. It is true that the crime of attempted grand larceny second degree is not necessarily included under a charge of crimi-

nally receiving stolen property (the then indictment against Paterno) (People ex rel. Wachowicz v. Martin, 293 N. Y. 361) but one can conceive a set of facts under which one guilty of criminally receiving stolen property could be guilty of larceny in unlawfully withholding the [fol. 64] stolen property from the owner thereof. (Penal Law, Section 1290; see People v. Vitolo, 271 App. Div. 959 (Advance Sheets No. 411); 136 A. L. R. 1091; and 2 Wharton on Criminal Law, Sections 1122 and 1168.) It must be true that of all the persons in the courtroom at the time of his plea, Paterno best knew whether or not he was guilty of the crime to which he plead, which crime grew out of, and was connected with the circumstances of the crime for which he was indicted. He chose to say that he was an actor in the crime which was the subject of the indictment, at least, to the extent of having committed attempted grand larceny second degree. An error of law there may have been when the Court accepted his plea, but it was not such an error for which he now has a remedy. His plea is to be distinguished from that of the defendant in People ex rel. Battista v. Christian, 249 N. Y. 314, where, in violation of his constitutional rights, the relator was arraigned without indictment, and from that of the defendant in People v. Miles, 289 N. Y. 360, in which Miles case the defendant was tried on an amendment to the indictment, which amendment was in no way related by facts or time to the charges in the original indictment itself. The last two mentioned cases were examples of violation of constitutional rights. Here, we have a mere error of law that was in no way harmful or prejudicial to Paterno. It was an error of law of which he took advantage to his benefit. To say that correction of such an error must or should lead to the remedy sought by Paterno [fol. 65] herein, would be to discard common sense and the ordinary proper administration of criminal law.

The order at Special Term, from which appeal is taken here, should be affirmed.

Stipulation Waiving Certification

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties in the above entitled action that the foregoing is a copy of the record as printed

in the Appellate Division, the Notice of Appeal to the Court of Appeals, Order Granting Leave to the Respondent-Appellant to Appeal to the Court of Appeals, Order Appealed From, Opinion for Affirmance of the Appellate Division, Fourth Department, and all of the papers upon which the Court below acted in making the Order Appealed From and the whole thereof, now on file in the office of the Clerk of the County of Erie, and certification of the same is hereby waived, pursuant to Section 170 of the Civil Practice Act.

Dated: Buffalo, New York, August —, 1947.

Saft, Schweitzer & Sullivan, Attorneys for Respondent-Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Petitioner-Respondent.

[fol. 66] In Court of Appeals of New York

In the Matter of the Application of John A. Lyons, as Commissioner of Correction &c., Petitioner, Respondent,

For an order directed to Honorable Carlton A. Fisher, as Judge of the County Court of Erie County, Respondent, and Joseph Paterno, Appellant

Remittitur—October 16, 1947

Be It Remembered, that on the 5th day of September in the year of our Lord one thousand nine hundred and forty-seven, Joseph Paterno, the appellant in this cause, came here unto the Court of Appeals, by Saft, Schweitzer & Sullivan, his attorneys, and filed in the said Court a Notice of Appeal and Return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And John A. Lyons, as Commissioner of Correction &c., and ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General and

Which said Notice of Appeal and Return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Ralph Saft of counsel for the appellant, and by Mr. Emil L. Cohen of counsel for the petitioner-

respondent, and due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed without costs, as aforesaid.

[fol. 67] And hereupon, as well the Notice of Appeal and Return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said Supreme Court, before the Justices thereof &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 16, 1947:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 68] At a Special Term of the Supreme Court, held in and for the County of Erie, at the Court House in the City of Buffalo, N. Y., on the 23rd day of October, 1947.

Present: Hon. Alger A. Williams, Justice of the Supreme Court.

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an Order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant

ORDER ON REMITTITUR—Filed October 23, 1947

The respondent-appellant above named having appealed to the Court of Appeals from an order of the Appellate Division, Fourth Department, entered in the Office of the Clerk of that Court, on the 30th day of April, 1947, and from the judgment of affirmance entered in the Office of the Clerk of Erie County on the 16th day of May, 1947, which order and judgment affirmed an order entered in the Office of the Clerk of Erie County on July 29, 1946, prohibiting the County Judge of Erie County from vacating a judgment of the County Court of Erie County entered on the 16th day of July, 1937, in an action entitled "People of the State of New York against Joseph Paterno," and enjoining and restraining the said County Judge of Erie County from taking any affirmative steps proposed to be taken by him in accordance with the opinion dated March 20, 1946; and said appeal having been argued by Mr. Ralph Saft of counsel for the appellant and by Mr. Emil L. Cohen, Assistant Attorney General of counsel for the petitioner-respondent, and the Court of Appeals, after due deliberation had thereon, having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from be affirmed without costs, and having further [fol. 69] ordered that the record and proceedings in the Court of Appeals be remitted to the Supreme Court, there to be proceeded upon according to law, and the remittitur of the Court of Appeals having been filed in the office of

the Clerk of Erie County on the 23rd day of October, 1947.

Now, on motion of Nathaniel L. Goldstein, Attorney-General, attorney for the petitioner-respondent herein, it is

Ordered that the said order and judgment of the said Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered that the order of the Appellate Division so appealed from be, and the same hereby is, affirmed without costs.

Alger A. Williams, Justice of Supreme Court.

Granted Oct. 23, 1947.

James V. Walsh, Sp. Dep. Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 69a] [File endorsement omitted.]

[fol. 70] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 233, Misc.

JOSEPH PATERNO, Petitioner,

vs.

JOHN A. LYONS, Commissioner of Correction of the State of New York

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—February 9, 1948

On petition for writ of Certiorari to the Court of Appeals of the State of New York.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be,

and the same is hereby, granted and the case is transferred to the appellate docket as No. 583, October Term, 1947.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 52,813. New York, Court of Appeals. Term No. 583. Vide 233 Misc. Joseph Paterno, Petitioner, vs. John A. Lyons, as Commissioner of Correction of the State of New York. Petition for writ of certiorari and exhibit thereto. Filed December 12, 1947. Term No. 583 O. T. 1947.